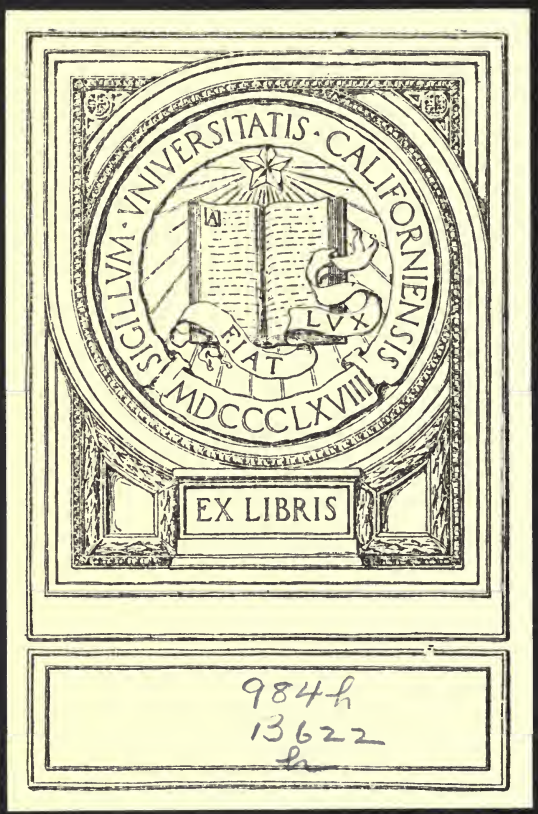
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Highways By Dedication

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EXCUSE AND SCOPE

No ambition to become a literary light set the task that has resulted in the following pages, but rather the inability to answer the same question presented in multitudinous ways by homesteader, road foreman and supervisor: "Is it a public highway?" The necessity to know the law to be found only in the cases was so compelling, that an exhaustive examination of the California decisions was entered upon.

That is the excuse and the only merit claimed for what follows.

Highways by Dedication

I. TERMS.

"Dedication" is the word most generally used in the authorities to name the process whereby land privately owned becomes voluntarily subjected to a public use.

> "Dedication of land to a public use is simply setting it apart or devoting it to that use."
>
> Smith v. San Luis Obispo (1892), 95 Cal. 463, 466.

No attempt will be made to list the cases characterizing the matter in which we are interested as "dedication". As exceptions, we note that the word "abandon" is sometimes used to express our idea: *Babcock v. Welsh* (1886), 71 Cal. 400; *Patterson v. Munyan* (1892), 93 Cal. 128; *Plummer v. Sheldon* (1892), 94 Cal. 533; and in *Rice v. Boyd* (1883), 2 Cal. Unrep. 196, it appears:

> "By dedication, he abandons the land to the public for the use to which he has subjected it."

See also:

> Prescott v. Edwards (1897), 117 Cal. 298, 301.

Section 2618 of the Political Code uses both terms. As we have said, however, "dedication" is the word employed most generally, and as there seems to be no distinction made between it and "abandon", we shall make none.

Of "dedications" there are said to be two forms: Express and implied.

> "The substantial difference between the two consists in the mode of proof. In the former case, the intention to appropriate the land to public use is manifested by some outward act of the owner, while in the latter it is shown by such acts and conduct, not directly manifesting the intention, but from which the law will imply the intent."
>
> Sussman v. San Luis Obispo Co. (1899), 126 Cal. 536, 539.

Chief Justice Beatty concurring in this case said: "In my opinion there is no inconsistency between the findings of dedication and of a prescriptive right in the public." A similar distinction, that is, recognizing not "express" and "implied" dedication but "dedication" and "prescription", is found in *Schwerdtle v. Placer Co.* (1895), 108 Cal. 589, where a discussion of the use of these terms is quoted from a Massachusetts case. In *Hartley v. Vermillion* (1903), 141 Cal. 339, the public is said to have gained its right to use a road by "prescription or implied dedication".

In *People v. Rindge* (1917), 174 Cal. 743, 755, we find:

> "It is manifest that if a public highway exists at all, it exists by prescriptive user and not by official acceptance of an offer of dedication."

In *Bolger v. Foss* (1884), 65 Cal. 250, however, we are told that "prescription" is not the word to use, but that it is "dedication", of which use is evidence.

Whatever the correct term, we have, as we shall find, two classes of cases: Those where dedication is evidenced by some affirmative act or expression of the owner; those where the dedication is implied from long continued, adverse use. These we shall consider separately.

II. INTENT AND OFFER TO DEDICATE.

(a) *Principles governing.*

Two of the essential elements of dedication are intent to dedicate and an offer. These two ingredients are so inextricably bound together that the courts frequently fail to separate them, and as the offer is but the manifestation of the intention, they may properly be discussed together.

We find several principles thoroughly established.

> "The vital principle of dedication is the intention to dedicate, the *animus dedicandi.*"
>
> Quinn v. Anderson (1886), 70 Cal. 454;
> People v. Reed (1889), 81 Cal. 70;
> Phillips v. Day (1889), 82 Cal. 24;
> Griffiths v. Galindo (1890), 86 Cal. 192;
> Logan v. Rose (1891), 88 Cal. 263;

Hibbard v. Mellville (1893), 3 Unrep. 879, 33 Pac. 201;
Silva v. Spangler (1896), 5 Unrep. 277, 43 Pac. 617;
San Francisco v. Grote (1898), 120 Cal. 59;
Eureka v. McKay & Co. (1899), 123 Cal. 666;
Niles v. City of Los Angeles (1899), 125 Cal. 572;
Wheeler v. City of Oakland (1917), 35 Cal. App. 671;
City of Venice v. Short Line etc. Co. (1919), 57 C. D. 502, 181 Pac. 658.

"Where a dedication rests in acts and conduct and not in grant, the rule is well settled and has been many times repeated by this court to the effect that 'property cannot be taken for public use without compensation unless the owner is willing, and this willingness should be manifested by clear and unmistakable acts. Parties may not be done out of their property by doubtful implications, no matter how greatly the public may be inconvenienced.'"

Burk v. Santa Cruz (1912), 163 Cal. 807, 812.

"Dedication is always a question of intent, and the acts of the owner of the property are sufficient to prove a dedication only when they are evincive of such intent, or, what amounts substantially to the same thing, when they are such as to estop him from denying that such was his intent."

Eureka v. McKay & Co. (1899), 123 Cal. 666, 670.

"When it is sought to show that an owner has, without a conveyance, divested himself of title to land in favor of the public, by way of gift or abandonment, the proof ought to be such as to clearly show that such was the owner's intent."

Latham v. Los Angeles (1891), 87 Cal. 514, 519.

"The question of intent is paramount, and, unless such intent expressly appears, or can be fairly inferred from the acts of the donor, there is no valid dedication."

Silva v. Spangler (1896), 5 Unrep. 277, 281, 43 Pac. 617.

To the same effect are the following:

Spaulding v. Bradley (1889), 79 Cal. 449;
Cerf v. Pfleging (1892), 94 Cal. 131;
Helm v. McClure (1895), 107 Cal. 199;
San Francisco v. Grote (1898), 120 Cal. 59.

(b) *Evidence of intent and offer, in general.*

What evidence has satisfied the courts of the existence of this necessary element of dedication? By way of general statement, we find that no formula of word or deed is necessary to dedicate land to public use, but that any act which reveals the intent is sufficient.

Harding v. Jasper (1860), 14 Cal. 642;
Hope v. Barnett (1888), 78 Cal. 9;
People v. Reed (1889), 81 Cal. 70;
Smith v. San Luis Obispo (1892), 95 Cal. 463.

In an even earlier case we find:

"There are several ways in which a dedication of land to the public use as a street or highway may be made. It may be made by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party."
San Francisco v. Scott (1854), 4 Cal. 114, 116.

In *Kittle v. Pfeiffer* (1863), 22 Cal. 484, the court lists as among the ways dedication can be made the following:

(1) Conveyance, though no grantee *in esse;*
(2) Sale by reference to map showing street;
(3) Sale of lots bounded by street (whether to boundary or centre line).

"The offer of the owner to dedicate may be manifested in a hundred different ways."
City of Los Angeles v. Kysor (1899), 125 Cal. 463, 466.

"Such intent need not be manifested by any contract, writing or express declaration of the owner. It may be implied from his conduct."
City of Venice v. Short Line Beach Land Co. (1919), 57 Cal. Dec. 502.

"Stronger evidence is required of the dedication * * * of a country road than of a street in a town or city."
Quinn v. Anderson (1886), 70 Cal. 454;
Harding v. Jasper (1860), 14 Cal. 642.

(c) *Evidence—maps of subdivisions.*

One of the manifestations of intent most frequently encountered is found in the platting of property for sale showing a

highway. Of course, it is only when the owner himself causes the subdivision to be made that the map is of any effect, for one's intention is not proven by what another has done.

Cerf v. Pfleging (1892), 94 Cal. 131;
City of Eureka v. McKay & Co. (1899), 123 Cal. 666;
City of Eureka v. Fay (1895), 107 Cal. 166;
Burk v. City of Santa Cruz (1912), 163 Cal. 807.

Nor is a reference to such unauthorized map by the owner of the land platted on it evidence of an intent to offer for dedication the land shown as highways. (*Cerf v. Pfleging, supra,* and *Eureka v. Fay, supra.*)

But where the owner of property makes or causes to be made a map of his land, showing a part as a highway (or park), and either records it or sells land by reference to it, he thereby clearly shows his intent to dedicate the portion shown as a highway (or park) to public use.

Stone v. Brooks (1868), 35 Cal. 489;
San Leandro v. Le Breton (1887), 72 Cal. 170;
Brown v. Stark (1890), 83 Cal. 636;
Griffiths v. Galindo (1890), 86 Cal. 192;
Wolfskill v. Los Angeles County (1890), 86 Cal. 405;
Logan v. Rose (1891), 88 Cal. 263;
Mills v. Los Angeles City (1891), 90 Cal. 522;
People v. Beaudry (1891), 91 Cal. 213;
Archer v. Salinas City (1892), 93 Cal. 43;
Southern Pacific v. Ferris (1892), 93 Cal. 263;
Eureka v. Fay (1895), 107 Cal. 166;
Koshland v. Spring (1897), 116 Cal. 689;
Sussman v. San Luis Obispo Co. (1899), 126 Cal. 536;
City of Anaheim v. Langenberger (1901), 134 Cal. 608;
Los Angeles v. McCollum (1909), 156 Cal. 148;
Davidow v. Griswold (1913), 23 Cal. App. 188;
People v. Langenour (1914), 25 Cal. App. 44;
Eltinge v. Santos (1915), 171 Cal. 278;
Berton v. All Persons (1917), 176 Cal. 610;
Daly City v. Holbrook (1918), 28 C. A. D. 66, 178 Pac. 725.

And see *Prescott v. Edwards* (1897), 117 Cal. 298, where instead of a map the land itself was marked off by stakes.

Nor does the fact that the highway shown is a *cul de sac* destroy the value of the evidence (*Stone v. Brooks* (1868), 35 Cal. 489, and *Smith v. San Luis Obispo Co.* (1892), 95 Cal. 463), even where the *cul de sac* is neither named nor labeled. (*Los Angeles v. McCollum, supra.*)

In *People v. Reed* (1889), 81 Cal. 70, 77, it appears, however,

> "But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the *public,* but the *filing;* and where the right to claim the street by the public *rests upon the map alone,* there is no offer to be accepted until the same is filed for record."

Under the present laws, the questions arising out of the making of a map and recording it are largely governed by statute. (Stats. 1907, p. 290, as amended.) So far no case has arisen where the provisions of this statute have not been complied with sufficiently to establish a highway by virtue of its power yet where the intent is manifest in an offer, and an acceptance is in evidence; but it seems quite possible that when that case arises it will be held that while the statutory dedication is not proven the common-law dedication is, and a public highway exists. Such a conclusion would find support in principle in *People v. Marin Co.* (1894), 103 Cal. 223, where the procedure was too imperfect to establish a highway by declaration under the statute, but nevertheless resulted in proving a dedication.

(d) *Evidence—reference in deeds.*

Evidence of the intent to dedicate is also found in the reference to a road contained in a deed conveying land.

> "It is useless to cite authorities to maintain the proposition. So firmly has it become established, that where lots are sold as fronting on, or bounded by, a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant, and vests in the grantee in common with the public the right of way over such street; that such acts on the part of the

> grantor constitute a dedication of such street, and that he cannot afterwards so sell or dispose of it as to alter or defeat such dedication."
>
> Breed v. Cunningham (1852), 2 Cal. 361, 368.

Expressing a similar conclusion are *City of Eureka v. Gates* (1902), 137 Cal. 89, and *City of Eureka v. Armstrong* (1890), 83 Cal. 623. The case last cited further holds that the intent thus shown is an intent to dedicate a street the length of the block, not just a *cul de sac.*

In *Helm v. McClure* (1895), 107 Cal. 199, sales of lots on a *cul de sac,* together with evidence of declarations that it was a street, were found to be sufficient to justify the finding that an intent to dedicate had existed and found expression.

Dedication was found in *Santa Ana v. Santa Ana Valley Irr. Co.* (1912), 163 Cal. 211, from a statement in certain deeds reserving "for road purposes" two strips of land each 25′ wide, lying adjacent to each other. This reservation alone, it was stated, was not inconsistent with finding this to be a private road, but taken in conjunction with subsequent acts the conclusion that there was an intention to dedicate the land to public use was held to be clear.

A conveyance of a ten-foot strip for street purposes, in connection with the conveyance of a lot for private purposes, was held in *Wheeler v. City of Oakland* (1917), 35 Cal. App. 671, to be sufficient proof that the strip was intended to be used as a public highway.

(e) *Evidence—statements—res gestae.*

In addition to the mere making of a deed, or map, the statements made in connection with the conveyance are to be considered in deciding whether or not a dedication has been made.

> "The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence."
>
> Tait v. Hall (1886), 71 Cal. 149.

To the same effect is *People v. Blake* (1882), 60 Cal. 497, and see *Helm v. McClure* (1895), 107 Cal. 199.

In *Sussman v. San Luis Obispo Co.* (1899), 126 Cal. 536, the intent to dedicate was found from statements publicly made at the time of the sale of lots in a subdivision that a street shown on a map of the subdivision was to be a public highway.

In *People v. Eel River etc. R. R. Co.* (1893), 98 Cal. 665, the statement of representatives of the railroad company made during the negotiations leading up to the purchase of a strip of land that it was to be for a public highway, was held admissible, and a dedication found. The declaration of real estate agents made to purchasers, that a way would be left open, is proper evidence of an intent to dedicate the way. (*City of Venice v. Short Line Beach Land Co.* (1919), 57 C. D. 502, 181 Pac. 658.) So also were the declarations of the owner that he had a map made for convenience in deeding the land to his wife, and children, and that the highway shown was not to be public unless paid for by the public, properly admitted to show that there was no intent to dedicate. *Smith v. Glenn,* (1900), 6 Cal. Unrep. 519, 62 Pac. 180.

(f) *Evidence—statement of intention.*

A statement, not of declarations made "while engaged in the performance of an act," but of the intent hidden in the mind of the owner of the land claimed to be subjected to a public easement, is not given much weight. In commenting upon the claim of error in refusing to permit an expression of such intent from the witness, our Supreme Court, in *Brown v. Stark* (1890), 83 Cal. 636, said (p. 642):

> "Her unexpressed intention, called for by the question, ruled out by the court, was of no material consequence."

In *Helm v. McClure* (1895), 107 Cal. 199, the owner had been allowed to testify that he never intended to dedicate the *cul de sac* claimed. This testimony was said to be relevant but not conclusive, to be in conflict with earlier statements in connection with the sale of lots, and the judgment finding that there was dedication was approved.

A somewhat similar situation in *Eureka v. Gates* (1902), 137 Cal. 89, brought forth the comment: "her unaided testi-

mony now as to what she intended by her deed cannot be taken as against the deed itself."

In *City of Los Angeles v. McCollum* (1909), 156 Cal. 148, a map had been filed showing a highway, but the owner wanted to testify that he had no intent to dedicate the street. His desire was commented on as follows (p. 152):

> "The rule that the party may give testimony of his actual intent should, we think, be limited to cases where the acts done by him do not manifestly indicate an intent to dedicate. Where they are inconsistent with anything but such intent, he cannot destroy the effect of his own conduct by subsequent declarations that he did not mean to be bound by the necessary import of that conduct. No weight should be given to declarations of an intent contrary to that plainly shown by acts done and acted on long before."

(g) *Evidence—fences and gates.*

Evidence of an express intent to dedicate is found when the owner moves his fence back from his property line to the edge of what thereafter becomes a road, *L. A. Cemetery Ass'n v. City of Los Angeles* (1893), 3 Cal. Unrep. 783, 32 Pac. 240; or when he builds fences on both sides of an open strip through his place, *Smith v. City of San Luis Obispo* (1892), 95 Cal. 463.

> "This fencing of the road would appear to constitute a clear and explicit intention of dedication to the public."
> Sherwood v. Ahart (1917), 35 Cal. App. 83, 86.

Gates *across* the highways are usually held to be strong evidence that the use is permissive and not under claim of right founded on dedication.

> Quinn v. Anderson (1886), 70 Cal. 454;
> Smithers v. Fitch (1889), 82 Cal. 153;
> Hibberd v. Mellville (1893), 3 Cal. Unrep. 879, 33 Pac. 201;
> Huffman v. Hall (1894), 102 Cal. 26.

But a finding of use will not be overcome by a finding that gates were maintained, which allowed of passage, *Bolger v. Foss* (1884), 65 Cal. 250; and where permission to maintain a

gate was sought from a member of the Board of Supervisors, this was regarded rather an acknowledgment than a denial of the public right.

Schwerdtle v. Placer County (1895), 108 Cal. 589.

(h) *Evidence—assessments and taxation.*

Whether or not the land claimed to be a highway has been assessed and the taxes thereafter levied paid, or whether the contrary is true, is of no interest, and furnishes no clue either to dedication or lack of it. In the following cases the land was assessed and the taxes paid:

San Leandro v. Le Breton (1887), 72 Cal. 170;
Mills v. City of Los Angeles (1891), 90 Cal. 522;
Smith v. City of San Luis Obispo (1892), 95 Cal. 463;
Schmitt v. San Francisco (1893), 100 Cal. 302;
Schwerdtle v. Placer County (1895), 108 Cal. 589;
Wheeler v. City of Oakland (1917), 35 Cal. App. 671;
City of Venice v. Short Line Beach Land Co. (1919), 57 C. D. 502, 181 Pac. 658.

In *Burk v. Santa Cruz* (1912), 163 Cal. 807, the land was not assessed, but this was held to be no defense to the plaintiff's claim that the so-called road was in fact private land.

(i) *Who can offer to dedicate?*

The following cases answer this question in one way or another, and may be of interest.

The City of San Francisco, by a void ordinance, had attempted to establish out of her pueblo lands a public square. The legislature approved the ordinance, thereby establishing a square without necessity of further public action.

Hoadley v. San Francisco (1875), 50 Cal. 265.

In the following cases, the "dedication" was made by the action of cities:

Mills v. City of Los Angeles (1891), 90 Cal. 522;
People v. Beaudry (1891), 91 Cal. 213;
San Francisco v. Burr (1895), 108 Cal. 460.

Dedication may be proven by the acts and representations of a corporation as well as those of individuals.

People v. Eel River etc. Co. (1893), 98 Cal. 665;
Sussman v. San Luis Obispo Co. (1899), 126 Cal. 536;
Southern Pacific v. Pomona (1904), 144 Cal. 339;
City of Venice v. Short Line Beach Land Co. (1919), 57 C. D. 582.

In *Southern Pacific Co. v. Hyatt* (1901), 132 Cal. 240, it was held that a railroad company could not permit any of its land to be alienated. On its facts, this case is in harmony with the authorities (Central Pacific Ry. Co. v. Droge (1915), 171 Cal. 32; Northern Pacific Ry. Co. v. Townsend (1903), 190 U. S. 267; H. A. & L. D. Holland Co. v. N. P. Ry. Co. (1913), 208 Fed. 598), the land in question being part of the public lands conveyed to the railroad company for a right-of-way, but its broad statement is in conflict with

People v. Eel River etc. R. R. Co. (1893), 98 Cal. 665;
Southern Pacific v. City of Pomona (1904), 144 Cal. 339,

and the weight of authority elsewhere.

Not a few of our highways owe their existence to a grant made by the federal government. In 1866 (sec. 2477, R. S. U. S.), Congress provided:

> "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Any use which would be sufficient under the state law to establish a highway is a sufficient acceptance of this federal offer.

McRose v. Bottyer (1889), 81 Cal. 122;
Bequette v. Patterson (1894), 104 Cal. 282;
People v. Quong Sing (1912), 20 Cal. App. 26.

See:
Schwerdtle v. Placer Co. (1895), 108 Cal. 589.

Some of the early pueblos received land from the United States Government for use as public highways. Some of the cases referring to this source are:

Hoadley v. San Francisco (1875), 50 Cal. 265;
People v. Beaudry (1891), 91 Cal. 213.

Contrary to not a little popular opinion, there is no right-of-way by necessity recognized over government land.

United States v. Rindge (1913), 208 Fed. 611.

III. ACCEPTANCE AND REVOCATION.

(a) *Is acceptance an element of dedication?*

We have discussed two of the elements of dedication, the intent to dedicate and the offer. Drawing an analogy from the field of contracts, we would expect to find (1) that to complete the dedication the offer must be accepted, and (2) that until so accepted, it may be withdrawn. These are the conclusions reached, but not without a great deal of confusion of thought and conflict of authority.

We have first those cases holding that an offer of dedication, evidenced by the filing of a subdivision map, becomes irrevocable if lots are sold with reference to the map. Such is the holding of *Town of San Leandro v. Le Breton* (1887), 72 Cal. 170, followed in *Daly City v. Holbrook* (1918), 28 C. A. D. 66; 178 Pac. 725. As to acceptance, the statement is made that no *formal* acceptance was necessary, and that the owner held "the title of the property dedicated in trust for the public" until formal acceptance was possible.

Then we have a distinction made, as in *Archer v. Salinas City* (1892), 92 Cal. 43, between "actual dedication and an offer to dedicate." "In the latter case, there must be an acceptance on behalf of the public before the dedication is complete, and the owner may at any time before such acceptance revoke the offer, while in the former case the acceptance will be presumed from the benefit arising from the dedication." It would seem that the mere recording of a map is only an offer to dedicate, but that if lots are sold by reference to the map "actual dedication" takes place. It also appears that "if the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him." But a little later it appears. "The owner, after selling some of the lots according to such map, might, either with the consent of the purchasers, or if he should

himself repurchase all of the lots so sold, withdraw such offer at any time before the public had acquired any interest in the streets, either from formal acceptance or by actual user."

Myers v. City of Oceanside (1907), 7 Cal. App. 87, repeats the statements above made to the effect that in the case of a complete dedication no acceptance is required, citing *San Leandro v. Le Breton, supra,* but holds that as the facts did not present a case of complete dedication, the offer to dedicate could be revoked, and having been there was no dedication.

Relying upon *San Leandro v. Le Breton* and *Archer v. Salinas City, supra,* we have *Davidow v. Griswold* (1913), 23 Cal. App. 188, holding that where an owner records a map of a townsite and sells lots with reference to it, he "has voluntarily placed himself in a position where equity will not permit him to deny thereafter that the said streets and parks are as represented by him; and, independent of the statement that they have been dedicated to public use, the other acts of the owner, considered in connection with the said purchases under the conditions mentioned, would preclude the said owner from contending, at least as far as said purchasers are concerned, that they are not streets and parks. And if they are to be considered as really streets and parks, when we regard the rights of the purchasers, it is difficult to understand how their *status* would be changed when we regard the rights of the public generally."

In *Schmitt v. San Francisco* (1893), 100 Cal. 302, *Archer v. Salinas City, supra,* was quoted from with approval, and the matter summed up as follows (p. 307):

> "In other words, if the dedication has not been accepted or the property used by the public, it is purely a question of *estoppel in pais.* If no one has acted upon the offer in such a mode that they would be injured by the revocation, the owner may revoke the dedication, even though it be an actual dedication and not a mere offer."

See also expressions in:

Schmitt v. San Francisco (1893), 100 Cal. 302;
Prescott v. Edwards (1897), 117 Cal. 298;
City of Los Angeles v. McCollum (1909), 156 Cal. 148;
People v. Langenour (1914), 25 Cal. App. 44.

The doctrine of these cases may be summarized as follows: Where an owner files of record a plat showing parks or streets, he offers these parks or streets for dedication; the dedication is not complete until the offer is accepted, and until accepted, either formally or by public use, it may be revoked. But where, after such offer is made, lots are sold by reference to the plat, at least in so far as the streets or parks of benefit to the parcels sold are concerned, there is a complete, irrevocable dedication, without acceptance or user, because the owner is estopped to deny his dedication.

This doctrine, however, does not stand unchallenged. In *Hayward v. Manzer* (1886), 70 Cal. 476, we find a case where maps were recorded and some sales made under the map, yet the court concludes: (1) That "howsoever it may have been as to the few persons who had purchased lots according to said map, whose rights in the premises we do not now determine," as to the public there had been no acceptance, and there was therefore no irrevocable dedication, and the offer to dedicate could be withdrawn; (2) that the plaintiff had title by adverse possession, "since what they claimed to belong to a street had never been dedicated, used, or accepted as such."

People v. Reed (1889), 81 Cal. 70, was an action to declare a strip of land a public street. The owner had made, but never filed, a plat showing streets, and considerable sales had been made from the map, but not of parcels fronting on the street it was sought to open. The following discussion, characterized as *dictum* in some of the contrary decisions already noted, is, nevertheless, in answer to objections raised in the case and is of interest (pp. 78-80):

> "It is conceded by counsel for respondent that the portion of the street in controversy 'has never been opened as a street,' and that 'on it the defendant had maintained a barn and shed and kept it inclosed with substantial fences for more than twenty years before this suit.' They take the position, however, that where the owner surveys and plats his property, and *makes sales of lots with reference to such plat,* the streets designated thereon are irrevocably dedicated to the public as streets. There are authorities sustaining this position. * * *

"But it is manifest that no such rule can prevail in this state, where it has been uniformly held that the owner may, at any time before his offer of dedication is accepted by the public, withdraw the same. As between him and the public, therefore, his act alone is not sufficient to constitute an irrevocable dedication. As we have said, it may be different as between him and private individuals to whom he has made sales of property with reference to the map. Much of the confusion in the decided cases has, in our judgment, grown out of the failure to distinguish between the right of the public authorities to claim a dedication and the right of a purchaser to compel the opening of a street on the ground of estoppel. (*Holdaw v. Trustees etc.*, 21 N. Y. 474; *Child v. Chappel*, 9 N. Y. 257.) In the case of *Grogan v. Hayward*, 6 Saw. 498, relied upon by the respondent, which was an action by a private individual, this distinction is clearly made. If the purchaser of property asserts his rights, the result may be the same, as to the mere keeping open of the street, as if a dedication is claimed by the public; but it does not follow that if he waives his right, the public can assert it, nor can the purchaser, by asserting his right to an open way, impose on the public the duty of keeping a street in repair that has never been accepted.

"The case of *San Leandro v. Le Breton*, 72 Cal. 172, seems to overlook this plain distinction between the right of a purchaser and the public, but there it appeared that there was an acceptance by the public authorities, so that, so far as the opinion can be construed as militating against the rule above laid down, it is a mere *dictum*, and should have no weight.

"Therefore, conceding that a platting of property and sale of lots constitutes a dedication, as between the owner and purchasers under him, of the streets delineated on the map, in order to constitute a dedication which can be taken advantage of by the public authorities of a city, the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance. * * *

"Such acceptance must be within a reasonable time after such offer of dedication, and if not accepted, the owner may resume the possession of the property and thereby revoke his offer."

In *Prescott v. Edwards* (1897), 117 Cal. 298, "the cause of action and relief sought are not made perfectly clear," but as

any offer to dedicate which may have been made had been revoked before acceptance by the public "either expressly, impliedly, or presumptively," the court said the whole question of dedication was eliminated (p. 301):

> "In saying that there is no question of dedication in the case, the term 'dedication' is used in its strictly legal sense. In that sense dedication is a matter purely between the owner and the public. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitutes a dedication of the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed. The statement is not correct as a legal principle, as may be seen from what has already been said."

The city of Los Angeles brought an action to quiet title to a park, relying on the filing of a subdivision map followed by sales. On appeal, our Supreme Court said (*City of Los Angeles v. Kysor* (1899), 125 Cal. 463, 6):

> "Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication, the owner upon the one side and the public upon the other. There can be no dedication without the participation of both; and no dedication can be stronger or more binding by the participation or intervention of others. The offer of the owner to dedicate may be manifested in a hundred different ways; and the acceptance of the offer by the public may be manifested in a like number of ways. Again, the fact that the owner sells lots by reference to a map of the tract, duly recorded, is not at all conclusive evidence of a dedication to the public of the streets and parks platted upon the map. * * *
>
> "Whatever may be the legal rights of the purchasers from defendant of the lots marked upon the recorded plat, by reference to the plat, is a matter not before us."

An action to quiet title to a plaza is considered in *City of Anaheim v. Langenberger* (1901), 134 Cal. 608. The plaintiff contended that the recording of a map of a subdivision consti-

tuted an offer to dedicate which, followed by sales, became absolute and irrevocable. The court said (p. 609):

> "As a matter of law, it cannot be said that dedication follows from the facts above set forth by plaintiff. Indeed, as a matter of fact we doubt if a court would be justified in declaring the ultimate fact of dedication to result from those probative facts. As far as the city is concerned, the court attaches little importance to the fact that the owner sold lots according to the plat or map on file in the recorder's office. Such acts by the owner may sometimes indicate an intention to dedicate a street or plaza, but in this case an intention to dedicate is amply shown by the filing of the map. And it may be said that the filing of a map has always been held to constitute an offer to dedicate. It is said in *Sacramento v. Clunie,* 120 Cal. 32: 'In the consideration of the question here presented, it must be borne in mind that the litigation is alone between the owner and the city. The question is purely one of dedication. The respective rights of the owners of the blocks who may have purchased from the parties filing the map are not involved. Such sales may be some evidence of intention to dedicate, but nothing more. The respective rights of owners rest upon other and different principles of law.' It thus appears that in a case involving the facts here presented, the act of the owner in selling lots according to the recorded plat is more important as evidence in a case between the owner and the purchaser, than in a case where the city is claiming a dedication to the public."

In *Eltinge v. Santos* (1915), 171 Cal. 278, we find a seeming confusion of the two theories we are reviewing (p. 282):

> "The findings do not support the conclusion that there was an irrevocable dedication of the strip of land in question to the public as part of a street. The filing of the map showed an intention to dedicate, but nothing more, while the filing of the later map by the investment company, Mitchell's successor, evidenced an intention to withdraw the offer. Public dedication is a matter between the owner and the public—not between the grantor and his vendees. The public by use or by formal action on the part of the proper authorities may accept an offer of dedication of a park or street. (*City of Los Angeles v. Kysor,* 125 Cal. 466 (58 Pac. 90); *City of Anaheim v. Langenberger,* 134 Cal. 608 (66 Pac. 855).) It is undoubtedly true that a vendor may be estopped to deny dedication when he has sold property to individuals on the faith of a

recorded map. Many of the authorities so holding are cited and analyzed in the recent case of *Davidow v. Griswold,* 23 Cal. App. 189 (137 Pac. 619)—a case in which a petition for hearing in this court was denied. But in this case the facts found indicate not only that the land in controversy was not used as a street, but that a part of it could not be so used, owing to the existence of the flag pole and telegraph pole at the corner of the space afterward occupied by Mr. Santos' building. So far as the public was concerned, Mitchell's successor had the right to revoke the offer of dedication if it had not been accepted either formally or by user. (*Schmitt v. San Francisco,* 100 Cal. 307 (34 Pac. 901).) This was done by the filing and recording of the map in June, 1903, showing Main street as of a uniform width of eighty feet.

"But the matter of plaintiff's private easement is one entirely different. Her predecessors in interest bought their property by the Mitchell map. True, the first deeds passed before the map was recorded, but the descriptions referred to the map and recognized the existence of Main street as delineated thereon. The subsequent recordation of the said map bound Mitchell and his successors so far as the sales to private individuals are concerned."

What, then, shall be our conclusion? Except in "actual dedication," and kindred cases, acceptance is recognized as an essential and the final step in the dedication of highways.

Harding v. Jasper (1860), 14 Cal. 642;
Spaulding v. Bradley (1889), 79 Cal. 449;
Forsyth v. Dunnagan (1892), 94 Cal. 438;
Helm v. McClure (1895), 107 Cal. 199;
City of Sacramento v. Clunie (1898), 120 Cal. 29;
Niles v. City of Los Angeles (1899), 125 Cal. 572.

See also cases cited above and in later discussion. That something must be said about acceptance seems to be felt even in the line of cases invoking estoppel. *Archer v. Salinas City* says it is assumed in "actual dedications"; from *San Leandro v. Le Breton* it appears that when the offer is irrevocable the title will be held in trust until acceptance may be made.

Then, too, it is agreed that, except in the one case where the offer to dedicate takes the form of recording a map, followed

by sales referable to the map, the offer may be withdrawn before acceptance by the public.

Why, in this one case, should the logical and otherwise accepted rule be abandoned? To be sure, private easements are created.

McLean v. Llewellyn Iron Works (1905), 2 Cal. App. 346;
Danielson v. Sykes (1910), 157 Cal. 686;
Eltinge v. Santos (1915), 171 Cal. 278.

And in view of the cases just reviewed, it is unquestioned that the purchasers, and their successors, may insist that the owner be estopped to deny the dedication. But is it correct to say, as was said in *Davidow v. Griswold, supra,* "This may not be *dedication* in the strict acceptance of that term, but the result is the same"?

We respectfully contend that the result is not the same, and that dedication has not resulted. One difference is that the public's rights to a highway cannot be lost by adverse possession,

Hoadley v. San Francisco (1875), 50 Cal. 265;
People v. Pope (1879), 53 Cal. 437;
Visalia v. Jacob (1884), 65 Cal. 434;
Ex parte Taylor (1890), 87 Cal. 91;
London & S. F. Bank v. Oakland (1898), 90 Fed. 691;
Kern I. Irr. Co. v. Bakersfield (1907), 151 Cal. 403;
Koshland v. Cherry (1910), 13 Cal. App. 440;
Davidow v. Griswold (1913), 23 Cal. App. 188;
Daly City v. Holbrook (1918), 28 C. A. D. 66, 178 Pac. 725;

but the purchaser's rights may be destroyed by adverse possession.

Hayward v. Manzer (1886), 70 Cal. 476;
Phillip v. Day (1889), 82 Cal. 24;
Anaheim v. Langenberger (1901), 134 Cal. 608;

and see comment in

Davidow v. Griswold, *supra,* at page 198.

Again, after the dedication *is* complete, the owner cannot withdraw his offer. How, then, can there be a complete dedication under the facts of *Archer v. Salinas City,* where the court says the owner could, after buying back the lots sold, or with the consent of the purchasers, withdraw the offer to dedicate?

We conclude that if dedication is a matter between the public and an owner, and it is, there is no dedication until the owner's offer is accepted by the public, and, until accepted, it may be revoked, whatever may be the rights of individual owners.

Of course, where the state or a city makes the dedication, if the term may be employed in such a case, no acceptance is necessary to complete the act.

Hoadley v. San Francisco (1875), 50 Cal. 265;
Mills v. Los Angeles (1891), 90 Cal. 522.

(b) *Evidence of revocation.*

Revocation may be established by evidence as varied as that establishing the intent.

A sale of property *in solido,* including that offered for dedication, but never accepted, operates as a revocation of the offer.

Hayward v. Manzer (1886), 70 Cal. 476;
Phillips v. Day (1889), 82 Cal. 24;
Schmitt v. San Francisco (1893), 100 Cal. 302;
Koshland v. Spring (1897), 116 Cal. 689;
Sacramento v. Clunie (1898), 120 Cal. 29;
Eureka v. McKay & Co. (1899), 123 Cal. 666;
City of Oakland v. Oakland W. etc. Co. (1912), 162 Cal. 675.

But a sale of property by reference to a map and also by metes and bounds, in which one boundary is the center line of the street, is not to be considered a withdrawal of an offer to dedicate, as in the case of a conveyance *in solido.*

Griffiths v. Galindo (1890), 86 Cal. 192.

The making of a replat omitting the streets shown on the former plat results in the withdrawal of the offer to dedicate evidenced by the first map.

Myers v. Oceanside (1907), 7 Cal. App. 87;
Eltinge v. Santos (1915), 171 Cal. 278.

See also:

San Francisco v. Burr (1895), 108 Cal. 460.

Erecting a building on land which had been offered as a highway puts an end to the offer.

Prescott v. Edwards (1897), 117 Cal. 298.

An adverse occupancy of land offered for dedication but never accepted, is in itself a revocation.

Anaheim City v. Langenberger (1901), 134 Cal. 608.

An offer to dedicate which by its terms may be withdrawn even after acceptance, is not an offer at all, and cannot result in a completed dedication.

San Francisco v. Canavan (1872), 42 Cal. 541.

(c) *Who is the "public"?*

We have reached the conclusion that to complete a dedication, acceptance by the public is necessary. By the public we do not mean, necessarily, any body politic or any public corporation.

> "When the squares were dedicated in the mode already stated, they were dedicated to public use; and this use did not vest in the city, nor in the inhabitants of the city, but in the public * * * like the streets of a city or the highways in a county."
>
> Hoadley v. San Francisco (1875), 50 Cal. 265, 274.

In *Helm v. McClure* (1895), 107 Cal. 199, the expression appears, "to the wayfaring uses of that somewhat vague entity called 'the public' ".

Nor need there be a grantee *in esse* at the time the easement for highway purposes passes to the public.

Kittle v. Pfeiffer (1863), 22 Cal. 484;

Carpinteria School Dist. v. Heath (1880), 56 Cal. 478.

(d) *Acceptance by public authorities.*

One of the most common methods of accepting highways previously offered for dedication is the adoption, by the legislative body of the county or city having jurisdiction, of a blan-

ket ordinance or order, not naming any particular streets, but covering all highways hitherto offered.

City of Eureka v. Armstrong (1890), 83 Cal. 623;
City of Eureka v. Gates (1902), 137 Cal. 89;
City of Los Angeles v. McCollum (1909), 156 Cal. 148.

Acceptance may be shown by ordering the street opened for public use.

Griffiths v. Galindo (1890), 86 Cal. 192.

Also, by securing additional territory to widen the proposed street and entering upon its improvement.

Wolfskill v. County of Los Angeles (1890), 86 Cal. 405.

In the last named case, we find a general statement to the effect that publicly dealing with property as a public highway by widening, extending, grading, changing its name and the like, are acts tending to prove acceptance.

(e) *Acceptance by public use.*

However,

"It is not necessary that the board of supervisors should cause a road to be recorded as such, to render a strip of land dedicated to the public as a public road a legal public highway.

Blood v. Woods (1892), 95 Cal. 78, 85;
People v. Power (1918), 27 Cal. Dec. 317, 175 Pac. 803.

"It is not necessary that the acceptance by the public be manifested by any direct action, ordinance or declaration of the public authorities."

City of Venice v. Short Line Beach Land Co. (1919), 57 C. D. 502, 181 Pac. 658.

"Such a requirement would destroy the common law doctrine of dedication."

Stone v. Brooks (1868), 35 Cal. 489.

See also:

San Leandro v. Le Breton (1887), 72 Cal. 170;
Wolfskill v. County of Los Angeles (1890), 86 Cal. 405;
Smith v. San Luis Obispo (1892), 95 Cal. 463;

L. A. Cemetery Ass'n v. Los Angeles (1893), 32 Pac. 240, 3 Unrep. 783;
Monterey v. Malarin (1893), 99 Cal. 290;
Helm v. McClure (1895), 107 Cal. 199;
People v. Power (1918), 27 C. A. D. 317, 175 Pac. 803.

But in these cases and the following, use by the public was held to be sufficient to prove the acceptance of the offer to dedicate.

Harding v. Jasper (1860), 14 Cal. 642;
San Francisco v. Canavan (1872), 42 Cal. 541;
People v. Blake (1882), 60 Cal. 497;
Rice v. Boyd (1883), 2 Cal. Unrep. 196;
Griffiths v. Galindo (1890), 86 Cal. 192;
Logan v. Rose (1891), 88 Cal. 263;
S. P. v. Ferris (1892), 93 Cal. 263;
Blood v. Woods (1892), 95 Cal. 78;
Helm v. McClure (1895), 107 Cal. 199;
Santa Ana v. Santa Ana etc. Co. (1912), 163 Cal. 211;
People v. Langenour (1914), 25 Cal. App. 44;
Berton v. All Persons (1917), 176 Cal. 610.

What is the nature and extent of the use that will prove public acceptance of an offer of dedication?

"In ascertaining whether or not a highway, park or public place has been accepted by user, the purpose which the way, park or place is fitted or intended to serve must be the standard by which to determine the extent and character of use which constitutes an acceptance."

Koshland v. Cherry (1910), 13 Cal. App. 440.

"In considering the extent of the use made by the public of the strip in dispute, the fact that at the time of the dedication the land was situated in a sparsely settled suburban community, and where travel over it was not very great, is to be considered."

Wheeler v. City of Oakland (1917), 35 Cal. App. 671, 675.

"This use must be of such duration that the public interest and private rights would be materially impaired if

the dedication were revoked, and the use by the public discontinued."

San Francisco v. Canavan (1872), 42 Cal. 541, 554.

Acceptance may be

"manifested either by a formal act of the public authorities or by habitual user by the public a sufficient length of time clearly to show that it was thus recognized, used, and accepted by the public as a public highway."

People v. Langenour (1914), 25 Cal. App. 44.

"* * * where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because the offer to dedicate, and the acceptance by use, both being shown, the rights of the public have immediately vested."

Schwerdtle v. County of Placer (1895), 108 Cal. 589, 593.

"If the right of the public is one derived from user alone (prior to the enactment of section 2621 of the Political Code in 1883) the right is no broader than the use. Such use over a road with gates would not authorize the removal of the gates."

Cordano v. Wright (1911), 159 Cal. 610, 622.

This case, it is true, does not present the problem of dedication because it relies on the old statute of mere use, but it would seem that the conclusion reached would be equally sound when applied to adverse possession, which presents evidence of acceptance in its proof of a presumptive offer of dedication.

The use of one of several streets offered for dedication by a subdivision is acceptance of the one and not of the others.

Wolfskill v. County of Los Angeles (1890), 86 Cal. 405.

Where a highway is offered for dedication by a map or other express declaration, a use of less than the full width shown is, nevertheless, held to be an acceptance of the whole amount offered.

Southern Pacific v. Ferris (1892), 93 Cal. 263;
Santa Ana v. Santa Ana etc. Co. (1912), 163 Cal. 211;
People v. Langenour (1914), 25 Cal. App. 44.

But "in the case of a highway by user or dedication, its width is limited by the extent of the actual user or dedication."

Freshour v. Hihn (1893), 99 Cal. 443.

The main travel does not have to extend the full width of the road, however. *Southern Pacific Co. v. Pomona* (1904), 144 Cal. 339. Perhaps the width of highways whose dedication is proven by adverse use is forty feet, irrespective of the width of the actual use.

> "Where the right of the public is acquired by user, the boundaries of the road are generally ascertained by reference to the user.
>
> "Where there is a statute fixing the width of all highways it has been said that the dedication to the purpose of a highway will be presumed to be the width fixed by the statute."
>
> People v. Marin County (1894), 103 Cal. 223, 231.

See also:

Graham v. Bailard (1909), 157 Cal. 96.

Dedication is not established by proof of use which cannot be connected with an offer. Use is not an acceptance if there is nothing to accept.

People v. Sperry (1897), 116 Cal. 593;

Smith v. Glenn (1900), 6 Unrep. 519, 62 Pac. 180.

IV. PRESCRIPTION OR IMPLIED DEDICATION.

So far we have been considering the more or less direct evidence of an intent and offer to dedicate, that is, cases of "express dedication". There remains the cases of "implied dedication", where the intent is said to be presumed to exist from adverse use continuing uninterruptedly for five years, or where, on whatever theory, dedication is found from such use. We find here some confusion in thought and must proceed carefully if we would be sure of our ground.

(a) *Statutes of interest.*

At one time there were special statutes in force in various counties, of which section 2 of "An act relative to highways in

Los Angeles county" (Stats. 1877-78, p. 6) is a fair example. That section declares:

> "All roads shall be conceded as public highways which have been used as such for five years, or which may hereafter be used for five years by the public as highways."

In *Southern Pacific Company v. Pomona* (1904), 144 Cal. 339, this statute was under consideration, and it was contended:

> "that the statute referred to should be construed as fixing the period, not as defining the character of the use necessary to establish a dedication and do not dispense with the requirement that use alone, to create a right in the public, must be adverse."

In reply, the court said:

> "The cases presently to be cited make no such distinction as is urged by appellants, and the statute does not, in our opinion, admit of the construction contended for."

citing among others the following, which support the court's conclusion:

> Hope v. Barnett (1888), 78 Cal. 9;
> Gloster v. Wade (1889), 78 Cal. 407;
> McRose v. Bottyer (1889), 81 Cal. 122;
> Freshour v. Hihn (1893), 99 Cal. 443 (intent of no interest),

and declaring that *Huffman v. Hall* (1894), 102 Cal. 26, was not *contra.* See also *Bolger v. Foss* (1884), 65 Cal. 250, where the five years' use is referred to as the statute of limitations rather than evidence, and its effect said to be without constitutional objection.

In 1872, section 2619 of the Political Code made a provision for the state similar to that above noted for Los Angeles county. It provided in part:

> "2619. Roads laid out and recorded as highways, by order of the board of supervisors, and all roads used as such for a period of five years, are highways."

In 1874, this section was amended by omitting "and all roads used as such for a period of five years".

In 1883, sections 2618-22 were re-enacted after repealing the old sections, and we now find in section 2621:

> "and no route of travel used by one or more persons over another's land, shall hereafter become a public road or by-way by use, or until so declared by the board of supervisors or by dedication by the owner of the land affected."

Section 2618, as enacted in 1872, read:

> "2618. Highways are roads, streets, or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public."

In 1883, section 2618 was re-enacted to read as it now appears:

> "2618. WHAT ARE HIGHWAYS. In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property."

(b) *The power of adverse use continues—that of mere use is ended.*

In 1872, it will be noted, we not only had a statute providing for the establishment of a highway by use, but also by dedication. This use, it is clear, was not necessarily adverse in character. In 1883, the creative power of "use" was ended, but dedication still recognized.

In the following cases, the extinction of *mere* use as a factor in creating highways, but the survival of *adverse* use resulting in dedication, is strongly implied.

In *Huffman v. Hall* (1894), 102 Cal. 26, stated in the Pomona case not to be in conflict with the conclusion that the use of the early statutes was not necessarily adverse, the statement is made that section 2619, as amended in 1874, "cannot be invoked as an authority for the creation of a highway by *mere* user," and that private property is not to be taken for public purposes by use "unless the use has been so adverse as to prevent the owner from asserting title thereto, and for this purpose it must be shown that the user was adverse."

In *Sutton v. Nicolaisen* (1896), 5 Cal. Unrep. 348, evidence of "simple user" was held not enough since *1874,* and as there was no claim of adverse use, no highway could be found.

See also:

Schwerdtle v. Placer County (1895), 108 Cal. 589;
People v. Rindge (1917), 174 Cal. 743.

From the expressions used in some of the cases it is difficult to say whether reliance is placed on the colorless use given creative power by the code, or whether the greater use recognized by the common law is present and relied upon. For such see:

Rice v. Boyd (1883), 2 Cal. Unrep. 196;
Babcock v. Welsh (1886), 71 Cal. 400;
Plummer v. Sheldon (1892), 94 Cal. 533;
Bequette v. Patterson (1894), 104 Cal. 282;
Barnes v. Daveck (1908), 7 Cal. App. 487.

In *Schwerdtle v. Placer County* (1895), 108 Cal. 589, we have a case where the simple user of the statute would, seemingly, have justified the conclusion that the land in question was a public highway, for it had been used from 1850 to 1887 without let or hindrance. But beyond the mere use, it was found "that the public, from the year 1850 to the year 1887, used the road openly, notoriously, and continuously, and adversely to plaintiff". The court continued (p. 593):

> "In the absence of any statute the common-law rule as to the presumption of dedication by adverse user will apply in this state, * * * where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."

Basing the decision on the case just referred to, the court, in *Sherwood v. Ahart* (1917), 35 Cal. App. 84, finds a dedication from like facts—although simple user under the statute would have sufficed.

Our present statute, then, declaring that no route of travel shall become a highway by use, refers to *mere* use, not such

adverse use as under the common law results in implied dedication; and even now highways come into being by use if that use is adverse for the prescriptive period. Such is now the clearly expressed law.

(c) *Cases of implied dedication.*

In addition to *Schwerdtle v. Placer County, supra,* which can only be understood as standing without the support of any statute, we have the well-considered case of *Hartley v. Vermillion* (1903), 141 Cal. 339, where the use was between 1889 and 1899; *People v. Myring* (1904), 144 Cal. 351, where the use began late in the year 1878; and *Leverone v. Weakley* (1909), 155 Cal. 395, where the findings do not go back of 1889. In this last named case, reference is made to the declarations of *Schwerdtle v. Placer County, supra,* and *Hartley v. Vermillion, supra,* and the statement made: "This view is not opposed to anything contained in section 2621 of the Political Code."

In *Hartley v. Vermillion, supra,* the court said (p. 348):

> "It is a matter of common knowledge that many roads and highways in this state—starting, perhaps, first as mere trails—became public highways without any formal or express dedication, but by long uninterrupted use and general acquiescence. When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission and without objection from anyone, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication."

Similar expressions are found in *People v. Myring, supra* (p. 354):

> "The dedication of a road as a public highway is the setting it apart by the owner of the land for the use of the public, and the subsequent use thereof by the public operates as an acceptance of the same and makes it a public highway. Such dedication may be express, as by a grant to the public, or it may be implied from the circumstances under which the road is set apart and used. The adverse user of the road by the public with the knowledge of the

> owner for a period of time corresponding to that fixed for conferring a title by prescription establishes as against the owner a presumption of dedication."

The case of *Sussman v. San Luis Obispo County* (1899), 126 Cal. 536, it may be argued, is a further case in point.

In *Barnes v. Daveck* (1908), 7 Cal. App. 487, we find the rule laid down that open use of land for highway purposes carries with it a presumption that the use is adverse, and the burden of proof is on those claiming that the use is permissive. The further principle is laid down that the character of adverse use required is that "inconsistent with the owner's right to claim exclusive use; i. e., such adverse use as carries with it the assertion of an equal right by the public to use the highway."

The duration of the adverse use required to establish a highway is that "fixed for conferring a title by prescription", *People v. Myring* (1904), 144 Cal. 351, or a period beyond that required to bar a right of action, *Hartley v. Vermillion* (1903), 141 Cal. 339, that is, five years. *Schwerdtle v. Placer County* (1895), 108 Cal. 589.

We think it thoroughly settled, then, that at the present time highways may be established by dedication evidenced by five years' adverse use. Nor do we feel that this conclusion is shaken by the following cases, which should, however, be kept in mind.

In *Cooper v. Monterey County* (1894), 104 Cal. 437, the court had found that a strip had "been continuously and uninterruptedly traveled and used by the general public as and for a public road or highway". This, the Supreme Court said, was "not necessarily inconsistent with a total absence of intention to dedicate, and may indicate merely a license". In its further discussion, the court points out there was "no allegation or claim of adverse user or of title by prescription".

The disposition of the question in *San Francisco v. Grote* (1898), 120 Cal. 59, is curt: "For a period of about eight years, without either consent or objection upon her part, the

land was used by the public generally for travel and this was all," and this "all" was held insufficient to show a dedication.

In *People v. Rindge* (1917), 174 Cal. 743, "prescriptive user" was recognized as a possible source of the creation of highways, but the fact that settlers, hunters and others had been allowed to use the road was held not to be evidence of intent to dedicate. Perhaps the federal case of *Coburn v. San Mateo County* (1896), 75 Fed. 520, can be justified on the same theory, but with difficulty on any theory.

In *Monterey v. Malarin* (1893), 99 Cal. 290, the court held that twenty years' uninterrupted use did not warrant a judgment that there was a highway, because "there was no finding that the owner ever intended or offered to dedicate * * * or ever had any knowledge of such use by the public".

Where the use, however, has all the characteristics that give title by prescription, it is safe to say that proof of that use will warrant the conclusion that a highway exists; a highway of no less width than, and subject to no restriction greater than those governing the use.

V. NONUSE OR ADVERSE POSSESSION OF HIGHWAYS.

Just a word seems in order on the effect of the adverse use and nonuse of highways. Until 1874, Political Code section 2620 provided: "A road not worked or used for the period of five years ceases to be a highway for any purpose whatever". Various changes followed, and now (since 1883) section 2619 of the Political Code provides in part:

> "All public highways, once established, shall continue to be public highways until abandoned by order of the board of supervisors of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction." (See also section 2621.)

In *McRose v. Bottyer* (1889), 81 Cal. 122, it is indicated that, under this section in conjunction with subdivision 4, section 811, Civil Code, a highway not used for five years is ter-

minated by operation of law; and the logic of the court is quite persuasive. So far as revealed by what may be an incomplete search, this conclusion is not shared by any other case; and it cannot be reconciled with the principle that a highway is not lost by adverse possession, for, in case of adverse possession, there is of necessity nonuse. But it is constantly averred that:

> "No one can acquire by adverse occupation, as against the public, the right to obstruct a street dedicated to public use, and thus prevent the use of it as a public highway."
> People v. Pope (1879), 53 Cal. 437, 451.

To the same effect, including cases of partial obstructions, are:

> Hoadley v. San Francisco (1875), 50 Cal. 265;
> Visalia v. Jacob (1884), 65 Cal. 434;
> *Ex parte* Taylor (1890), 87 Cal. 91;
> London etc. Bank v. Oakland (1898), 90 Fed. 691;
> Kern etc. Co. v. Bakersfield (1907), 151 Cal. 403;
> Koshland v. Cherry (1910), 13 Cal. App. 440;
> Davidow v. Griswold (1913), 23 Cal. App. 188;
> Daly City v. Holbrook (1918), 28 C. A. D. 66, 178 Pac. 725.

In *London & S. E. Bank v. Oakland, supra,* the road in question had been used for residential purposes for at least part of forty years, and it had never been used as a highway. Its dedication was complete, however, and was held to be "irrevocable".

In *Koshland v. Cherry, supra,* the alley in dispute had been fenced off for twenty-three years, but it was held no rights adverse to the public had been acquired.

> "It is hardly necessary to say that after the dedication * * * the use of only a portion * * * by the public shows no abandonment of the unused portion."
> Santa Ana v. Santa Ana etc. Co. (1912), 163 Cal. 211, 219;
> Graham v. Bailard (1909), 157 Cal. 96.

A highway resulting from mere use under the early statutes continues after the statutes are repealed.

> People v. Quong Sing (1912), 20 Cal. App. 26.

It would seem, then, that highways do not terminate from nonuse nor from adverse possession, but our courts may yet carry further the argument started in *McRose v. Bottyer, supra.*

IN CONCLUSION.

It is evident that for most, if not all, of the problems arising in relation to "highways by dedication", an answer may be found in the cases of the appellate courts of our own states. It is likewise apparent that to date those answers are not altogether harmonious. But through the cases run recognized principles, and make possible, under any state of facts, an intelligent and reasonably certain reply to the query: "Is this a public highway?"